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NO. 81-2231

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

KENNETH L. McLEOD, D.V.M.

Petitioner,

v.

KENNETH CHILTON, LAWRENCE BECK, ROBERT BOWMAN, DWAYNE DOBSON, DON MARTIN and KENNETH MORRISON, individually and as members of THE STATE OF ARIZONA LIVESTOCK SANITARY BOARD; JOSEPH SAMSILL; WAYNE WIEKHORST, D.V.M.; and THE STATE OF ARIZONA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF ARIZONA DIVISION ONE

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, through the Attorney General of the State of Arizona, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Arizona Court of Appeals opinion in this case.

RESTATEMENT OF THE QUESTION PRESENTED

Whether a state employee who serves at the will of the employing state board is entitled to a *pre-termination* hearing when the reasons for his dismissal were publicized at an open meeting of the employing state board at his request.

RESTATEMENT OF THE CASE

The significant facts of this case are not in dispute and are set out in the Arizona Court of Appeals opinion at some length (Pet. 1a-8a). What is in dispute is the manner in which the petition characterizes the issues that were before the Court below.

Although the petition alleges that the Arizona Court of Appeals held that the United States Constitution does not require that McLeod be given a due process hearing (Pet. p. 4), this misstates not only the Court's opinion but the issue addressed by the Court below.

As the following discussion indicates, the petition's failure to reflect accurately what issues were before and addressed by the Arizona Court of Appeals is reason for this Court to deny the petitioner's request for certiorari.

REASONS FOR DENYING WRIT

1. *This Court lacks jurisdiction in this matter since McLeod did not raise the issue of an alleged conflict between the public's right to open board meetings and a dismissed public employee's right to a post-termination liberty interest hearing in the Court below.*

Petitioner McLeod alleges that the Question Presented raises the issue of "a direct conflict between the right of a public employee to have a hearing when dismissed for publicized defamatory reasons, with the right of the public to have meetings of its boards held open to scrutiny." (Pet. p. 5).

The problem with the Question Presented is that the alleged issue was never raised before the Arizona Court of Appeals; and, that Court did not decide this case upon the basis of an alleged conflict between policies underlying Arizona's open meeting law and McLeod's right to a liberty interest hearing.

It is settled that unless the federal question is raised and preserved in proceedings below, it cannot be raised for the first time in this Court.[1]

The petition's arguments are further flawed for failure to distinguish between pre-termination and post-termination hearing rights. Relevant portions of the Arizona Court of Appeals opinion do address the issue of whether there was a liberty interest involved in McLeod's dismissal, but this issue was addressed solely within the context of McLeod's contention that he was entitled to a *pre-termination* hearing notwithstanding his at-will employee status.

The Court of Appeals opinion turns on whether McLeod had a right to *pre-termination* hearing upon any basis. After balancing the parties' interests, the Court of Appeals held that McLeod had no right to a pre-termination hearing, even if a liberty interest had been involved. Moreover, the Court indicated that McLeod had no liberty interest, since he served at the Livestock Board's pleasure and the Board was not required to inform him of the reasons for his dismissal. The Court went on to note that those reasons were not made public until after McLeod's own request that any dismissal discussions be public (Pet. 18a-21a).

2. *The facts below do not support the Question Presented and formulated in the petition; nor can the facts support a determination of that question by this Court.*

The factual background for the petition (and the four consolidated appeals to the Arizona Court of Appeals that resulted in the opinion McLeod now seeks this Court to review) are unique to McLeod's situation (Pet. 1a-8a). Few other litigants (if any) shall be affected by a decision in this case because the matter turns on its own facts.

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1. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn.*, 360 U.S. 334, 342, n.7, 3 L.Ed.2d 1280, 79 S.Ct. 1196 (1959); *Cardinale v. Louisiana*, 394 U.S. 437, 438, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969); *Hill v. California*, 401 U.S. 797, 805, 28 L.Ed.2d 484, 91 S.Ct. 1106 (1971); *Taron v. Arizona*, 410 U.S. 351, 352, 35 L.Ed.2d 346, 93 S.Ct. 998 (1973).

Based upon the facts stated in the Arizona Court of Appeals opinion, the Livestock Board reviewed McLeod's dismissal in a closed meeting on August 22, 1979. On August 23, 1979, the Livestock Board provided McLeod a dismissal letter (including grounds for dismissal). McLeod filed a complaint in the Superior Court of Arizona on August 24, 1979, claiming that the Board had violated Arizona's open meeting law by reviewing his dismissal in a closed meeting against his wishes.

It was only after McLeod commenced litigation by filing the August 24, 1979 complaint against the Board that the Board readdressed his dismissal in an open Board meeting on August 30, 1979. Thus, contrary to the petition, the case deals only with an at-will state employee who chooses to have the reasons for his discharge publicized.

3. *The Arizona Court of Appeals decision below does not conflict with any decision of the United States Supreme Court or other federal appellate courts.*

The petition states at page 5 that this Court should accept certiorari because the Arizona Court of Appeals has decided important federal questions and "there is an apparent conflict" on the decided issue between two federal courts of appeals. At page 7, the petition cites these federal cases as *Cato v. Collins*, 539 F.2d 656 (8th Cir. 1976), and *Dennis v. S & S Consolidated Rural High School*, 577 F.29 338 (5th Cir. 1978). However, the Arizona Court of Appeals opinion is not in conflict with any United States Supreme Court or other federal appellate court decisions.

Further, these cited cases are not in conflict with each other. Even assuming arguendo that there is a conflict between these cited cases, that conflict should be resolved at the time a federal appellate matter is brought to this court, and not a state court decision such as this.

The *Dennis* court's opinion does not hold that it makes no difference whether the dismissal charges are aired at a public meeting held at the request of the terminated employee. Moreover, it does not appear that the parties in *Dennis* directly addressed an alleged issue of *how* the stigmatizing charges against teacher John Dennis became public. It is even more apparent that the manner in which the charges were made public was not the basis for the *Dennis* court's opinion.

This is evident from the Court's holding on page 339:

> The critical issue raised by this appeal is whether a non-tenured public school teacher with no property interest in the renewal of his teaching contract is entitled to Fourteenth Amendment due process when the school board subjects him to a badge of infamy in the course of refusing to renew his contract. We hold that he is.

It should also be noted that the petition discusses the alleged question in a manner that avoids substantial law on point. By claiming an alleged conflict between public policy interests in open meetings and a dismissed public employee's liberty interest, the petition attempts to circumvent the substantial number of decisions that indicate an employee has no liberty interest where the alleged stigmatizing matters are not made public, or publication is due solely to the employee's own actions.[2]

4. *McLeod has no standing to assert the right of the public to have board meetings open to public scrutiny.*

The petition asserts that the denial of a liberty interest hearing when employee termination reasons are discussed at requested public meetings will "invite a substantial chilling effect on First Amendment rights," since "such rulings discourage terminated employees from exercising the fundamental First Amendment right of having board actions open to public scrutiny." (Pet. p. 10)

McLeod never argued below that his own conduct requesting open meeting discussion of his dismissal was protected by the first amendment and therefore precluded the denial of a liberty interest. Now, McLeod attempts to argue the

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2. For example: *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (no liberty interest where charges not made public); *Galaway v. Lawson*, 438 F.Supp. 968 (8th Cir. 1976) (no liberty interest where employee voluntarily publicized charges); and *Clark v. Mann*, 562 F.2d 1105 (8th Cir. 1977) and *Cato v. Collins*, 539 F.2d 656 (8th Cir. 1976) (employees requested charges be publicized).

first amendment rights of third parties whose expression allegedly shall be chilled by the Arizona Court of Appeals and the 8th Circuit. This contention is not supported by the facts of this case and McLeod has no standing to litigate the rights of third parties herein.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 1st day of July 1982.

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